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**IN THE  
COURT OF APPEALS OF INDIANA**

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APPEAL FROM THE VANDERBURGH CIRCUIT COURT  
The Honorable David D. Kiely, Magistrate  
Cause No. 82C01-0601-FC-85

**December 30, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Derek E. Baker appeals his placement in the Department of Correction, arguing the court abused its discretion when it failed to place him on home detention. We find no abuse of discretion and affirm.

### **FACTS AND PROCEDURAL HISTORY**

On January 20, 2006, police officers were dispatched to Baker's home. Baker consented to a search of his home and police found cocaine, marijuana, drug paraphernalia, and a gun.

The State charged Baker with Class C felony possession of cocaine,<sup>1</sup> Class A misdemeanor possession of marijuana,<sup>2</sup> Class A misdemeanor possession of paraphernalia,<sup>3</sup> and Class B felony possession of a firearm by a serious violent felon.<sup>4</sup> Due to Baker's health problems, numerous trial dates were cancelled and rescheduled.

On January 30, 2008, Baker pled guilty to Class C felony possession of cocaine and Class B felony possession of a firearm by a serious violent felon. The plea agreement required the State to dismiss the two remaining charges under that cause number in addition to a Class D felony possession of marijuana charge under another cause number. The plea agreement capped the Class C felony sentence at two years, capped the Class B felony sentence at eight years, and required the sentences be served concurrently. Finally, the agreement called for the court to resolve a pending petition to revoke probation under a third cause number by discharging Baker unsatisfactorily from

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<sup>1</sup> Ind. Code §§ 35-48-4-6(A), 35-48-4-6(B)(1)(b).

<sup>2</sup> Ind. Code § 35-48-4-11(1).

<sup>3</sup> Ind. Code §§ 35-48-4-8.3(A)(1), 35-48-4-8.3(B).

<sup>4</sup> Ind. Code § 35-47-4-5(C).

that probation.

The court accepted the plea agreement. It found a mitigator in Baker's poor health and an aggravator in Baker's criminal history. The court sentenced Baker to two years for the Class C felony<sup>5</sup> and to six years for the Class B felony,<sup>6</sup> with the sentences to be served concurrently at the Department of Correction.

### **DISCUSSION AND DECISION**

Baker argues the court abused its discretion in ordering him to serve his six years at the Department of Correction rather than on home detention.<sup>7</sup> "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (internal quotation omitted), *reh'g granted* 875 N.E.2d 218 (Ind. 2007).

In ordering the six years served at the Department of Correction the court explained: "Sir, your prior criminal history and the fact that you have these three cases pending that [sic] cause me to send you to the Indiana Department of Corrections [sic]." (Tr. at 48-49.)

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<sup>5</sup> "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Ind. Code § 35-50-2-6.

<sup>6</sup> "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5.

<sup>7</sup> The State addresses Baker's argument as whether his sentence is inappropriate in light of his offense and character. However, he makes no such argument, and we therefore address only whether the court abused its discretion.

Baker's criminal history consists of convictions in 1995 of Class A misdemeanor trespass, Class A misdemeanor operating a vehicle while intoxicated, and Class B felony possession of cocaine; convictions in 1997 of Class B felony dealing in cocaine and Class D felony possession of cocaine; a conviction in 2001 of Class A misdemeanor possession of marijuana; convictions in 2003 of Class C felony nonsupport of a dependent, Class A misdemeanor trespass, and Class A misdemeanor criminal mischief; and a conviction in 2005 of Class A misdemeanor driving while suspended. The court revoked Baker's placement in a drug supervision program in 1996. Baker was on probation when the underlying events occurred, and pursuant to the plea agreement herein the court discharged him unsatisfactorily. Finally, by the time of his guilty plea, Baker had additional charges pending for Class A misdemeanor and Class D felony possession of marijuana. Accordingly, the record fully supports the trial court's explicit findings supporting its decision to send Baker to the Department of Correction.

Baker asserts the court abused its discretion

in not considering the scope of care BAKER requires, and the additional mitigating factors of BAKER's cooperation with the police during his arrest, his guilty plea, the likelihood BAKER will commit another crime, BAKER's likelihood of responding well to home detention, and the undue hardship to BAKER and his family resulting from imprisonment.

(Appellant's Br. at 9.) We first note trial counsel did not mention, at sentencing, Baker's cooperation with police during his arrest or the hardship his imprisonment would cause his family. Accordingly, those alleged mitigators are waived for appeal. *See Anglemeyer*, 868 N.E.2d at 492 ("the trial court does not abuse its discretion in failing to consider a

mitigating factor that was not raised at sentencing”).

To the extent Baker is arguing the trial court should have given more weight to the mitigator it found in Baker’s health problems, we note we may not review the trial court’s weighing of aggravators and mitigators. *Id.* at 491.

As trial counsel was arguing for home detention based on Baker’s physical health problems, he mentioned Baker had been crime free for two years and would probably do well in “home incarceration,” (Tr. at 44-45), because Baker left home only for doctor appointments. It was not at all clear, however, that counsel was suggesting those facts should qualify as additional mitigators; rather, they seemed to be advanced to support the notion that Baker’s health had declined significantly. Nevertheless, in light of Baker’s lengthy criminal history and the fact that the crimes at issue herein all occurred in Baker’s home, we find no abuse of discretion in the court’s failure to find significant these two alleged mitigators. *See Anglemeyer*, 868 N.E.2d at 493 (“An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record.”).

Finally, as for Baker’s guilty plea, we find no abuse of discretion in the court’s determination his plea was not a significant mitigator. *See Anglemeyer v. State*, 875 N.E.2d 218, 221 (Ind. 2007) (court does not err in failing to find plea significant mitigator if defendant received substantial benefit in return or if evidence against defendant was overwhelming). Baker’s plea was not entered until two years after he was charged with the crime and after his trial date had been set and rescheduled numerous

times. As police found the cocaine and gun in Baker's house during a search to which he consented, his conviction seems certain. Baker received significant benefits by pleading guilty: three additional charges were dropped, his sentences were capped at nearly the minimum possible, and a petition to revoke probation was resolved by discharging Baker from probation.

Baker has not demonstrated the court abused its discretion in sentencing him to the Department of Correction. Accordingly, we affirm.

Affirmed.

NAJAM, J., and ROBB, J., concur.